as a result of the plaintiff endorsing over his outstation cheques to the defendant or as a result of his buying at a discount the defendant's outstation cheques was not a loan and that the post-dated cheques were therefore not a promise to repay the loan. The case re-emphasized the importance of looking at the nature of the transaction which the parties have agreed in order to determine whether the principal object of the transaction is moneylending or not.

We now turn to the agreement between the respondents and their client, the guarantee which the appellants gave them and the purchases made by them on behalf of the client and the drawing of the dishonoured drafts. Can we seriously say that the primary object of the respondents' agreement with their client in giving confirming facilities is one of lending money? If the receipt of bills of exchange maturing at certain dates accepted by the customers of an art dealer in *Litchfield* v. *Drey'us* and if purchases by finance houses of notes maturing at certain dates issued by a company carrying on hire-purchase business in order to finance such business in *Transport and General Credit Corporation Ltd.* v. *Morgan*, and if the discounting of cheques in *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory* are all not moneylending transactions, it is difficult to see on what ground the respondents' agreement with their client can be held to be a moneylending transaction and the respondents a moneylender. The essence of the transaction is that the client was purchasing goods from a U.K. supplier and that it was doing so through the intermediary of the respondents who acted as an agent and financed the purchases. In this arrangement the respondents or one of their subsidiaries accepted the supplier's drafts in payment for the goods and later drew U.S. dollar drafts for acceptance by the client to get back their money. Thus, instead of there being one bill of exchange drawn by the seller to be accepted by the client, there were two drafts — one drawn by the seller and accepted by the respondents or one of their subsidiaries, and another drawn by the respondents and accepted by the client. Two drafts are involved in every purchase just as there are two agreements entered into by a confirming house. In our view, confirming houses being a recognized institution in the promotion and participation of export trade, and their business being distinct, under no circumstances the transactions into which the respondents entered with their client, with the supplier and with the appellants — all being normal practice of a confirming house — can be held to be moneylending, and the respondents by entering into these transactions a moneylender.

The learned judge in the court below said that it was not disputed that the respondents were a bank. However, we do not find in any of the affidavits used in the case that the respondents were a bank, although its memorandum and articles entitle them to carry on the business of a bank. In any case, a bank is distinct from a confirming house and its obligation is narrower than that of the latter. We therefore hold that the respondents are a person who *bona fide* carries on a business not having for its primary object the lending of money, and that as such they are not a moneylender. To describe a confirming facility as a "camouflage" moneylender, as was submitted by counsel for the appellants, in our view, is an abuse of language as it reflects neither the understanding of the mechanics and ramifications of export trade nor the meaning of "moneylender" and "business of moneylending" within the meaning of the Ordinance. The fact that a purchaser who has no money to pay for the goods there and there uses the services of a confirming house is not borrowing of money. It is a fact of life that for many centuries export trade across national boundaries has been carried on by methods devised mostly by merchants and bankers and that the law only intervenes to sanction the practices which they have legitimately evolved and to disallow those which are contrary to the statute, public morals and policy.

We therefore agree with the learned judge that the appellants' statement of defence did not disclose any serious defence requiring trial at all. There being no triable issue, an application under Order 14 prayed for by the respondents for a final judgment to enforce the guarantee, in our judgment, was correctly made. The decision of the Registrar which was upheld by the learned judge must stand and the appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitors: *T.S. Chong & Co.; John Ang & Co.*

LOH HOCK SENG & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) December 5, 1979]

[Penang — Federal Court Criminal Appeal No. 27 of 1979]

Criminal Law and Procedure — Appeal — Sentence — Death sentence — Should be imposed in proper case — Trafficking in dangerous drug — Dangerous Drugs Ordinance, 1952, s. 39B(1).

In this case the appellants had been convicted on a charge of trafficking in 1550.1 grammes of heroin. Hong Hoo Chong, the second appellant, was sentenced to imprisonment for life and 14 strokes of the rattan. He appealed against the sentence and the Public Prosecutor cross-appealed against the sentence imposed.

Held: in the circumstances of this case, the imposition of a term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence and the circumstances of the case against the appellant, his record of previous convictions, the public interest involved in respect of crimes of this nature and a sufficient factor of deterrence to others of his ilk. The sentence of death should therefore be substituted for the sentence of imprisonment for life and whipping.

Case referred to:-

(1) *Tan Boon Liat* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1976] 2 M.L.J. 83.

FEDERAL COURT.

R. Rajasingam for the appellant.

Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The two appellants were jointly

charged, tried and convicted on June 22, 1979 in the High Court in Malaya at Penang on the following charge:

"That you jointly on the 24th of March 1978 at about 8.50 p.m. at the car park of Central Hotel, Penang Road, in the District of George Town, in the State of Penang, in furtherance of the common intention of you all, did on your own behalf, traffic in dangerous drugs, to wit, heroin weighing 1,550.1 grammes, and you have thereby committed an offence under section 39B(1) (a) of the Dangerous Drugs Ordinance No. 30 of 1952 punishable under section 39B(2) of the same Ordinance read with section 34 of the Penal Code."

The 1st appellant Loh Hock Seng was then sentenced to imprisonment for life and 7 strokes of whipping and the 2nd appellant Hong Hoo Chong to imprisonment for life and 14 strokes of whipping. They both appealed to this court against conviction and the Public Prosecutor cross-appealed against the sentence imposed.

The appeal was heard before us on December 5, 1979. Counsel appearing for the appellants indicated at the outset that he had yet to obtain instructions from the 1st appellant as to whether he wished to proceed with his appeal and as a result only argued the appeal by the 2nd appellant. There were ten grounds of appeal but counsel intimated he was abandoning all the grounds except three which he argued, namely, on the question of proof of common intention, the admissibility of the statement made by the 2nd appellant and the matter of possession, custody and control of the subject-matter of the charge. We found no substance in the arguments and contentions advanced, were satisfied that the 2nd appellant had been properly convicted and accordingly dismissed his appeal against conviction. The Deputy Public Prosecutor then proceeded with his appeal against the sentence imposed on the 2nd appellant.

There have been several convictions in the country for trafficking in drugs under section 39B of the Ordinance but the courts have invariably sought out of a sense of compassion to exercise mercy and have imposed accordingly only the second alternative of a sentence of life imprisonment, and we understand this is the first time in which the Public Prosecutor has appealed against the imposition of such a sentence, no doubt in respect of the 2nd appellant in view of the facts and circumstances surrounding and relating to his case.

Sentencing in a criminal case must of course bear relation to the particular circumstances of the offender as well as the particular circumstances of the offence. The legislature has in its wisdom and in the implementation of its plenary powers in this respect enacted the imposition of the alternative penalties of death or imprisonment for life under section 39B of the Ordinance with the option and discretion in this regard to be no doubt judicially and judiciously exercised according to the facts and circumstances of a particular case, and we can see no reason whatsoever why the statutory enactment of the option for punishment by death cannot and should not be made functionally operative and exercised and applied *proprio vigore* if the circumstances and facts of the case so warrant, justify, require and perhaps even demand.

Notwithstanding the several convictions for trafficking in drugs that have been secured, the rampancy of this type of offence still continues unabated with sequential impetus to related offences under the Ordinance, and in view of the current and continuing upsurgence of indulgence in dangerous and deleterious drugs and offences relating to and connected therewith, we feel the time has now come for some more vigorous element of deterrence to be brought to bear upon those trafficking in drugs, both active and potential, who are no less than engineers of evil and pedlars of death, to the intent and extent that intending offenders should be made to desist and be deterred, that those one step ahead and in the course of promoting or participating in such heinous activity should realise the extremely grave consequences they face, stop dead in their tracks, repent and resile, and that those who, notwithstanding still pertinaciously persist and have the misfortune of being apprehended, should know they are in for the punishment prescribed by law to fit the crime. As was said by Abdoolcader J., in *Tan Boon Liat* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.*[1] trafficking in drugs strikes at the very core of public order, and he went on to add (at page 88):

"Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquillity and society generally."

Turning to the 2nd appellant's case, he was convicted on clear evidence quite apart from his own statement taken on a caution properly administered and which was admitted at his trial. The amount of heroin involved is very substantial, 1550.1 grammes to be exact, and he also has several previous convictions for armed robbery, house-breaking and theft and one for possession of heroin under section 12 of the Ordinance. There would appear to be no redeeming features but the learned judge states in his grounds of judgment that after some hesitation in considering the sentence to be imposed he decided he would give the 2nd appellant one more chance, presumably in the stock phrase to turn over a new leaf. In our view the learned judge had the percipience to see the special malignancy of the offence and the antecedents of the offender but not the courage to reflect it in the sentence. We are of the view that he was clearly in error which entitles this court to interfere. We would like to take this occasion to reaffirm expressly, unequivocably and unanimously that where the case justifies it, judges should not develop a phobia against inflicting the death penalty. In our view, the prescribing of a maximum penalty in respect of an offence not only marks the limits of the court's discretionary power as to sentence, it also ordinarily prescribes what the penalty should be in the more serious type of cases falling within the relevant class of the offence meriting the maximum punishment prescribed.

We are of the view that in the circumstances of the 2nd appellant's case, the imposition of a term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence and the circumstances of the case against him, his record of previous convictions, the public interest involved in respect of crimes of this nature and a sufficient factor of deterrence to others of his ilk.

We accordingly allow the Public Prosecutor's appeal against sentence in respect of the 2nd appellant, set aside the term of imprisonment for life and whipping imposed on him and substitute therefor the sentence of death.

Order accordingly.

Solicitors: *R. Rajasingam.*

IUN CHUNG YANG & ANOR. v. SUPERINTENDENT OF LANDS AND SURVEYS, FIRST DIVISION, SARAWAK.

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 3 & December 6, 1979]

[Kuching — Federal Court Civil Appeal No. 111 of 1978]

Land Law — Land Acquisition — Value of building on land — Land and building method.

In this case the High Court, in an appeal from the decision of the Superintendent of Lands and Surveys by the dissatisfied landowners whose lands had been compulsorily acquired, increased the valuation of the land but took off the valuation on the houses and crops on the land. The owners appealed to the Federal Court.

Held: a valuation should have been given to the houses on the land and in this case the order of the Superintendent giving an assessment of the value of the houses as an addition to the value of the land should be restored, subject to an increase in the land values themselves as found by the High Court.

Cases referred to:-

(1) *Re Dhanjibhoy Bomanji* 10 Bom. L.R. 701.

(2) *Nanyang Manufacturing Co.* v. *C.L.R. Johore* [1954] M.L.J. 69.

(3) *State of Kerala* v. *P. P. Hassan Koya* [1968] S.C.A. 362; A.I.R. 1968 S.C. 1201.

(4) *Vyricherla Narayana* v. *The Revenue Divisional Officer, Vizagupatnam* 66 I.A. 104.

(5) *T. Adinarayana Setty* v. *Special L.A. Officer* A.I.R. 1954 Mysore 71.

FEDERAL COURT.

Mathew Chan for the appellants.

Peli Aron, Registrar of Land and Survey, Kuching, for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The three Land References, on appeal from the decision of the Superintendent of Lands and Surveys, First Division, Sarawak by the dissatisfied landowners whose lands had been compulsorily acquired, took an unexpected turn in the High Court, at least in the case of two of them. While the valuation of the land, qua land, was slightly increased in all three cases, the awards for the value of the buildings and of the crops on Lots 41 and 52 and the value of the 2 waterborne systems on the formers, which the Government valuer had agreed to and the Superintendent had awarded, were, to the surprise not only of the landowners but also of the Government valuer, taken away. Hence the appeal of the owners of these 2 lots to this court. In the other case, Lot 38 was vacant land and the landowner was, quite understandably, not dissatisfied with the increase that he received. He therefore did not appeal. Neither did the Superintendent. Nor did the Superintendent cross-appeal in the other two cases on the valuation on the land itself placed by the learned judge who sat with 2 assessors.

This valuation was an increase from $150,000 per acre to $165,000 to take account of the potentialities of the land. With respect we agree that, in the circumstances of this case, this is a proper increase to make.

The sole question at the appeal was therefore whether the learned judge was right in taking off the valuations of the houses and the crops on Lot 41. His reason for so doing was the difficulty he saw in assessing the value of the land itself. He relied on the following passage from *Re Dhanjibhoy Bomanji*[1]:

> "Land is a marketable commodity of one description, and land and buildings on it, is a marketable commodity of another and a different description and there is no known process by which from the ascertained value of land plus buildings as an investment, it is possible to deduce the value of the land alone."

This passage does not appear to be of any value for reliance.

We agree that the comparison method, that is the method of taking recent *bona fide* sales of land in the vicinity possessing similar or near similar characteristics, recommended in *Nanyang Manufacturing Co.* v. *C.L.R. Johore*[2] and since then consistently adopted by our courts at all levels, is a fair method but in applying it, it has to be borne in mind that the operative condition is "lands acquired and possessing similar advantages." It does not work when transactions of purchase of bare lands are used as the yardstick for lands with houses. Nevertheless, we do not think that difficulties of assessment absolves the court from its task of doing its duty and from adopting another method open to it to do so.

Where therefore there are no comparable transactions available that could validly be applied, the two usual methods are either the land and capitalisation method in which to the value of the land as land is added a capitalisation of the return actually received or reasonably expected to be received therefrom, as applied in *State of Kerala* v. *P.P. Hassan Koya*[3] and in *Vyricherla Narayana* v. *The Revenue Divisional Officer, Vizagapatnam*[4] or the land and building method as applied in *T. Adinarayana Setty* v. *Special L.A. Officer.*[5] In the last case, on appeal to the Supreme Court of India the judgment of the High Court was modified as regards the value of the land but not of the building on the land.

The land and building method which was employed in this case by the Superintendent and said by him to be a long standing practice was not a new one. It was approved and adopted in the High Court at Kuching by Lee Hun Hoe J. (as he then was) in Kuching Land References Nos. K.1, K.2, K.3, K.4, K.5, K.6 and K.7 of 1968.

It seems to us that the principle of at-arms transactions, viz. of taking the value which a willing vendor might reasonably expect to receive from a willing purchaser, must necessarily import a valuation being given to the house on the land, either by the method of capitalisation of return actually or which might